Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

APPENDICIES TO
WRIT OF CERTIORARI.

IRA M. BALL, ESQ.
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February 16, 1979

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OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, THIRD DEPARTMENT, REPORTED AT 64 A.D. 2d 723, 407 N.Y.S. 2d 76.

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IRA M. BALL, et al., Appellants,

v.

HUGH L. CAREY, as Governor of the State of New York, et al., Respondents.

Supreme Court, Appellate Division Third Department.

July 6, 1978.

Persons associated with State Bingo Control Commission brought action challenging effort by state officials to dismantle Commission and transfer its functions to the State Racing and Wagering Board. The Supreme Court, Special Term, Albany County, denied plaintiffs' motion for summary judgment and dismissed complaint, and plaintiffs appealed. The Supreme Court, Appellate Division, Third Department, held that: (1) Governor, Secretary of State, and director of budget were absolutely immune from liability for their allegedly tortious conduct in attempting to dismantle the State Bingo Control Commission, and state officials who acted at or under the direction of officials with absolute immunity were not liable, in absence of

allegations to suggest that any one or a combination of them independently effected the discontinuation of offices in the Commission, and (2) persons who were associated with the State Bingo Control Commission but who did not pay bingo license fees lacked standing to challenge constitutionality of such fee.

Affirmed.

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Ira M. Ball, pro se.

Louis J. Lefkowitz, Atty. Gen. (William J. Kogan, Asst. Atty. Gen. of counsel), for respondents.

Before MAHONEY, P.J., and GREENBLOTT, KANE, MAIN and HERLIHY, JJ.

MEMORANDUM DECISION.

Appeals from orders of the Supreme Court at Special Term, entered April 19, May 24, May 27 and September 15, 1976 in Albany County, which, inter alia, denied plaintiff's motion for summary judgment and to add parties plaintiff and dismissed the complaint.

This action was commenced in November of 1975 by individuals associated with the New York State Bingo Control Commission to challenge what they perceived as illegal and unconstitutional efforts by various State officials to dismantle the



Commission and transfer its functions to the New York State Racing and Wagering Board. The factual background giving rise to this litigation and many of the legal theories propounded in connection with it need not be detailed for they are adequately set forth in decisions on a parallel suit in which one of the present plaintiffs secured a judgment against the State for unpaid salary (see Ball v. State of New York, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, affg. 52 A.D.2d 47, 382 N.Y.S.2d 835). Moreover, while the complaint initially requested several different types of relief, it is acknowledged that the subsequent legislative abolition of the Commission (L.1977, ch. 46) has mooted a number of those requests and rendered academic plaintiffs' appeals from certain intermediate orders. Nevertheless, plaintiffs assert that two of their original demands possess continuing viability and that, as to them, the order of Special Term denying summary judgment in their favor and dismissing the complaint was in error. They also maintain that Special Term improperly refused permission to add additional parties plaintiff to the action. We disagree and affirm its orders.

/1/ Plaintiffs claim entitlement to damages from the defendants individually in an amount equal to the salary and benefits they would have received had they not become separated from their respective positions with the Commission. Although judgment is not sought against the Comptroller or the President of the Civil Service Commission, it seems plain that many of the other defendants, such as the Governor, the Secretary of State and the Director of the Budget, would be absolutely immune from liability for the tortious conduct attributed to them (see Stukuls v. State of New York, 42 N.Y.2d 272, 397 N.Y.S.2d 740, 366 N.E.2d 829; James v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Orangetown & Clarkstown, 37 N.Y.2d 891, 378 N.Y.S.2d 371, 340 N.E.2d 735). Whether the remaining defendants should be accorded this same or some lesser privilege need not be decided for it seems equally plain that, in relation to this matter, they merely acted at or under the direction of those who were absolutely immune and there are insufficient allegations to suggest that any one or a combination of them independently effected the discontinuation of plaintiffs' offices.



/2, 3/ Plaintiffs also seek a declaration that the bingo license fee represents an unconstitutional revenue tax. However, we again find it unnecessary to reach the merits of their arguments. Since plaintiffs do not pay such fees, they are not aggrieved by them and, thus, lacking standing to raise the issue. There is no impenetrable barrier to judicial review of this legislative scheme by those who are subject to these fees (cf. Boryszewski v. Brydges, 37 N.Y.2d 361, 364, 372 N.Y.S.2d 623, 625, 334 N.E.2d 579, 581) and plaintiffs' status as citizen taxpayers does not enhance their position for they are not attacking a "wrongful * * * disbursement of state funds" (State Finance Law, §123-b, subd. 1). Lastly, inasmuch as their complaint was to be dismissed, the addition of parties plaintiff who could separately protect their own interest was not indicated. We find no abuse of Special Term's discretion in its decision to refuse permission to add such parties and sufficient facts were not presented on the renewal of that motion to warrant an alteration of its former decision.

Orders entered May 27 and September 15, 1976 affirmed, with costs. Appeals from orders entered April 19 and May 24, 1976, dismissed as academic, with costs.



At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 17th day of April, 1978.

PRESENT: HON. A. FRANKLIN MAHONEY, Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. J. CLARENCE HERLIHY, Associate Justices.

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Same Title ORDER

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The appellants having appealed from orders of the Supreme Court at Special Term entered April 19, 1976, May 24, 1976, May 27, 1976 and September 15, 1976 in the office of the Clerk of Albany County which, inter alia, denied the plaintiffs' motion for summary judgment

and to add parties plaintiff and which dismissed the complaint and said appeal having been heard during the above-stated Term of this Court, and Ira M. Ball, having appeared for the appellants, and Louis J. Lefkowitz, Attorney General of the State of New York (William J. Kogan, of Counsel) having appeared for the respondents, and the Court after due deliberation having rendered its decision on the 6th day of July, 1978, it is hereby

ORDERED that the orders entered on May 27, 1976 and September 15, 1976 so appealed from be and the same hereby are affirmed with costs, and it is further

ORDERED that the orders entered April 19, 1976 and May 24, 1976 be and the same hereby are dismissed as academic with costs.



E N T E R:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: July 10, 1978

A TRUE COPY

/s/ John J. O'Brien
Clerk

(seal)

State of New York
Supreme Court - County of Albany

Same Title JUDGMENT

The Appellants herein having appealed from orders of the Supreme Court at Special Term entered April 19, 1976 and May 24, 1976 in the office of the Clerk of Albany County which, inter alia, denied plaintiffs' motion for preliminary injunction and to renew, and the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department after due deliberation, having rendered a decision on the 6th day of July, 1978, ordering that the orders so appealed from be dismissed as academic, with costs, and an order having been entered so affirming, it is hereby



ADJUDGED, that the orders entered on April 19, 1976 and May 24, 1976 so appealed from be, and the same hereby are, dismissed as academic, with costs of $110.00 to the Respondents herein, and that the Respondents have execution thereon.

/s/ Guy A. Paquin
Clerk

DATED AND ENTERED:

(Certified Copy)

State of New York
Supreme Court--County of Albany

Same Title JUDGMENT

The appellants herein having appealed from the orders of the Supreme Court at Special Term entered May 27, 1976 and September 15, 1976 in the office of the Clerk of Albany County which inter alia, denied the plaintiffs' motion for summary judgment and to add parties plaintiff and dismissed the complaint, and the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department after due deliberation, having rendered a decision on the 6th day of July, 1978 ordering that the orders so appealed from be affirmed, with costs, and an order having been entered so af-



firmed, with costs, and an order having been entered so affirming, it is hereby

ADJUDGED, that the orders entered on May 27, 1976 and September 15, 1976, so appealed from be, and the same hereby are affirmed, with costs of $110.00 to the Respondents herein, and that the Respondents have execution thereon.

/s/ Guy A. Paquin
Clerk

DATED AND ENTERED:

(Certified Copy)

MEMORANDUM reported at 45 N.Y. 2d 837.

State of New York
Court of Appeals

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Same Title

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Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.



STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-sixth day of September A.D. 1978.

PRESENT, Hon. Charles D. Breitel, Chief Judge, presiding

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Same Title

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A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no

substantial constitutional question is directly involved.

/s/ Donald M. Sheraw
Donald M. Sheraw
Deputy Clerk of the Court



MEMORANDUM

STATE OF NEW YORK
COURT OF APPEALS

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Same Title

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Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of December A.D. 1978

PRESENT, Hon. Charles D. Breitel,
Chief Judge, presiding.

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Same Title

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A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the

appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

(Certified Copy)



STATE OF NEW YORK
SUPREME COURT - COUNTY OF ALBANY

Same Title

JUDGMENT
Index No.
15351-75

The Petitioner-Appellant herein, having made a motion for leave to appeal to the Court of Appeals of the State of New York from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on the 10th day of July, 1978, and the Court of Appeals, after due deliberation, having rendered a decision on the 6th day of December, 1978, ordering that the said motion be denied, with twenty dollars costs and necessary reproduction disbursements, and an order having been

entered so affirming it is hereby:

ADJUDGED, that the aforesaid motion be, and the same hereby is denied, with costs of $24.20 to Respondents, Hugh B. Carey, Individually and as Governor of the State of New York, et. al., and that the Respondents have execution thereon.

/s/ Mary Lindsay
Deputy Clerk

DATED AND ENTERED:

(Certified Copy)



STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Same Title

Supreme Court, Albany County Special Term, January 9, 1976
Justice Edward S. Conway, presiding

CONWAY, J:

This is a motion by the defendants to dismiss the plaintiffs' complaint pursuant to Rule 3211(a)(2), (3), (5) and (7) CPLR upon the grounds that: (1) the Court lacks jurisdiction of the subject matter; (2) the plaintiffs lack standing to maintain the third cause of action; (3) the statute of limitations has expired; and (4) the complaint fails to state a cause of action.

The plaintiffs oppose the motion of the defendants and cross-move for summary judgment for the relief prayed for in the

complaint upon the ground that there are no triable issues of fact and there are no defenses to the cause of action asserted in the complaint.

The plaintiffs also seek in a subsequent proceeding to add as parties plaintiff certain charitable organizations in the State of New York who are holders of bingo licenses, and to amend the original complaint served on the defendants.

Plaintiff Ira M. Ball was appointed as a member and Chairman of the State Bingo Commission for a five-year term commencing June 1, 1974. Plaintiffs Freda, Pickney and Moskovit are members of the State Bingo Control Commission, and the remaining original plaintiffs are former employees of the Bingo Control Commission whose services were ter-



minated in April, 1975.

The Governor, in the 1975-76 Executive Budget submitted to the Legislature, recommended the abolition of the State Bingo Control Commission with the corresponding transfer of the functions of the Commission to the State Racing and Wagering Board. The State Purposes Budget (Chapter 50 of the Laws of 1975) was signed into Law on April 7, 1975 and carried out the recommendations of the Governor. No funds were appropriated in the Department of State for the Bingo Control Commission, and the Racing and Wagering Board received an appropriation of some $210,000 to regulate bingo. A bill was also introduced to repeal the sections of the Executive Law relating to establishment of the Bingo Control Commis-

sion. The bill passed the Assembly but failed of passage in the Senate. The services of plaintiff Ira M. Ball were terminated "based upon difficult fiscal circumstances" on April 8, 1975.

The plaintiffs first cause of action alleges that the State Purposes Budget of 1975 violates Article VII of the New York State Constitution and is ineffective insofar as it relates to any appropriation for the enforcement of the bingo laws and rules. The second cause of action alleges that defendants have usurped the rights and powers of the plaintiffs and all other incidents and privileges of their offices without any legal warrant or right. The third cause of action alleges that the license fees collected by the State for the



issuance of bingo licenses constitutes an unconstitutional tax upon charitable organizations. The fourth cause of action alleges that the Legislature has failed to make adequate appropriations for bingo regulations and that the plaintiffs were damaged by defendants alleged illegal actions which deprived plaintiffs of their Civil Service positions and loss of their salaries and benefits. The fifth cause of action alleges that defendants have conspired to exclude the plaintiffs from their offices and have taken all steps necessary to prevent the plaintiffs from exercising their rights to administer the rules and regulations of the Bingo Commission.

It is the contention of the defendants that the Budget does not violate the

provisions of Article VII of the Constitution and the four months' statute of limitations expired on August 8, 1975 (Budget was adopted April 7, 1975) and the lawsuit is therefore untimely. The defendants further content that the complaint fails in any event to state a cause of action and further, as to the third cause of action, the plaintiffs lack standing to challenge the constitutionality of the licensing fees. With these contentions this Court must agree.

The failure of the 1975 Legislature to repeal Section 433 of the Executive Law (which created the Bingo Commission) does not entitle plaintiffs to the relief sought in their complaint. Under Chapter 50 of the Laws of 1975, the Legislature appropriated additional funds to the



Racing and Wagering Board, thereby implementing the Governor's recommendation in this regard as set forth in the Executive Budget, and failed to appropriate funds for the Bingo Commission. Such appropriation, which served to abolish the Bingo Commission and transfer its licensing and supervisory functions to the Racing and Wagering Board, was a legitimate exercise of the Legislature's budgetary powers, even though the Legislature failed to repeal the statute abolishing the Bingo Commission.

This Court agrees with the decision of the learned Justice John T. Casey, dated March 23, 1976, denying a preliminary injunction in this proceeding wherein he stated:

"The issue presented is whether the Legislature in adopting the 1975 Budget evidenced an intent to abolish the New York State Bingo Control Commission. In my opinion, the specific language contained in the Program Budget Presentation recommending the abolition of the State Bingo Control Commission and the subsequent passage of the Budget by the Legislature evidences a sufficient direct action on the part of the Legislature to abolish the State Bingo Control Commission. The failure of the Legislature to pass the bill directly affecting the State Bingo Control Commission does not, in my view, negate the direct action by the Legislature. Church of the Ascension v. New York State Racing and Wagering Board, New York Law Journal, January 22, 1976, P. 8 Col. 2-3; c.f., Lorraine v. Carey, unpublished opinion of Hon. James Gibson dated April 22, 1975; contra, Ball v. State of New York, 83 Misc. 2d 903."

In view of the conclusion on the merits that the plaintiffs are not entitled to the relief sought by their complaint, it is unnecessary to further consider the



procedural questions raised. Suffice to say that plaintiffs did not possess the standing to raise the constitutionality of the licensing fees.

The motion of the defendants dismissing the complaint is granted, and the cross-motion of the plaintiffs for summary judgment is therefore denied, as is the subsequent motion to add parties plaintiff and amend the compliant.

Defendants to submit order.

At a Special Term of the Supreme Court of the State of New York, held at the Albany County Courthouse, Albany, New York on the 9th day of January, 1976.

P R E S E N T :
HONORABLE EDWARD S. CONWAY
Justice of the Supreme Court

Same Title

ORDER
Index No.
15351-75

Defendants having moved to dismiss the complaint, pursuant to CPLR, 3211(a)(2), (3), (5) and (7) upon the grounds that (1) the Court lacks jurisdiction of the subject matter; (2) the plaintiffs lack standing to maintain the third cause of action; (3) the Statute of Limitations has expired; and (4) the complaint fails to state a cause of action, and plaintiffs having cross-moved for summary judgment upon the grounds that there are no tri-



able issues of fact and no defenses to the cause of action asserted in the complaint, and plaintiffs also having moved to add additional parties plaintiff and to serve an amended complaint, now

UPON the summons dated November 21, 1975, the complaint, verified by Ira M. Ball, Esq. on November 20, 1975, the notice of motion to dismiss dated December 16, 1975, the affidavit of Kenneth J. Connolly, Esq., sworn to December 16, 1975, the notice of cross-motion dated December 30, 1975, the affidavit of Ira M. Ball, Esq., sworn to December 30, 1975, the reply affidavit of Ira M. Ball, Esq., sworn to December 10, 1975, the order to show cause on motion for joinder of additional parties, signed by Honorable Howard A. Zeller, Justice of the Supreme

Court, on February 23, 1976, the affidavit of Ira M. Ball, Esq., sworn to February 23, 1976, the affidavit of Rev. James Flanagan, sworn to February 17, 1976, the affidavit of Edythe Rosenblitt, sworn to February 13, 1976, the affidavit of Lynne Glatter, sworn to February 13, 1976, the affidavit of Rev. Robert O'Connor, sworn to February 27, 1976, the supplemental summons, dated February 23, 1976, the proposed amended complaint, verified by Ira M. Ball, Esq., on February 23, 1976, the affidavit in opposition of Kenneth J. Connolly, Esq., sworn to on February 26, 1976, the reply affidavit of Ira M. Ball, Esq., sworn to March 1, 1976, and upon all the papers and proceedings heretofore had herein, and after hearing Ira M.



Ball, Esq., attorney for plaintiffs, in opposition to the motion to dismiss and in support of the cross-motion for summary judgment and in support of the motion to add parties plaintiff and amend the complaint, and Louis J. Lefkowitz, Attorney General of the State of New York, Kenneth J. Connolly, Esq., of counsel, in support of the motion to dismiss and in opposition to the cross-motion for summary judgment and in opposition to the motion to add parties plaintiff and amend the complaint, and the Court having rendered a decision dated April 13, 1976, granting the motion to dismiss and denying the cross-motion for summary judgment and denying the motion to add parties plaintiff and amend the complaint, it is

ORDERED, that the defendants' motion

to dismiss the complaint is hereby granted and the complaint is hereby dismissed, and it is

FURTHER ORDERED, that plaintiffs' motion to add parties plaintiff and amend the complaint is hereby denied.

Dated: April 26, 1976
Albany, New York

/s/ Edward S. Conway
EDWARD S. CONWAY
Justice of the Supreme Court

Enter:

Clerk



At a Special Term of the Supreme Court of the State of New York held at Chambers at 99 Washington Avenue in the City of Albany on the 10th day of August, 1976.

P R E S E N T :
HONORABLE EDWARD S. CONWAY
Justice of the Supreme Court

Same Title

Order
Index No.
15351-75

Plaintiffs having moved for an order seeking leave to reargue and/or rehear and/or renew plaintiffs' motion for summary judgment and plaintiffs' motion to add parties plaintiff, now

UPON the order to show cause signed by the Honorable Edward S. Conway, Justice of the Supreme Court on July 1, 1976, the affidavit of Ira M. Ball, Esq., sworn to July 1, 1976, the affidavit of Kenneth J. Connolly, Esq., sworn to July 26, 1976, and upon all the papers and proceedings heretofore had

herein, and after hearing Ira M. Ball, Esq., attorney for plaintiffs, in support of the motion and Louis J. Lefkowitz, Attorney General, Kenneth J. Connolly, Esq., of counsel, attorney for defendants, in opposition thereto, it is

ORDERED, that the motion is, in all respects, denied.

DATED: Albany, New York

/s/ Edward S. Conway
Edward S. Conway
Justice of the Supreme Court



STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Same Title

(Supreme Court, Special Term, Albany County, December 11, 1975)
(Justice John T. Casey, Presiding)

M E M O R A N D U M

CASEY, J.

The plaintiffs have moved for a preliminary injunction enjoining the State Racing and Wagering Board of the State of New York from the following: (1) approving fair and reasonable maximum rent schedules to commercial lessors for bingo occasions to be held in 1976; (2) issuing bingo suppliers licenses for the year 1976; (3) from hearing any appeal from municipal determinations concerning bingo hearings and other matters; (4) exercising any other powers granted to the

State Bingo Control Commission under Section 435 (1) of the Executive Law; (5) compelling certain civil service employees who were transferred from the State Bingo Control Commission to the State Racing and Wagering Board from working out of title; (4) disbursing any funds appropriated to the State Racing and Wagering Board for bingo enforcement purposes.

The plaintiffs consist of the New York State Bingo Control Commission, the members of the Commission, and the employees and investigative staff of the Commission. The defendants are comprised in part of the Governor of the State of New York, the Secretary of State, the State Racing and Wagering Board, the Comptroller of the State, and the President of the State



Civil Service Commission.

Under Chapter 437 of the Laws of 1962 the State Bingo Control Commission was created within the Department of State. Executive Law, §433. The Commission being legislatively created, it may be abolished only by statute and a failure to appropriate salary for such a commission is insufficient action to abolish the commission. Matter of Sullivan v. Taylor, 279 N.Y. 364; Matter of Collins v. City of Schenectady, 256 App. Div. 389; Timpano v. Hanna, 77 Misc.2d 874, aff'd 44 App. Div.2d 912; see Friedman v. D'Antonio, 50 App. Div.2d 9.

In the Program Budget Presentation the Executive Department recommended the abolition of the State Bingo Control Commission and a transfer of the remain-

ing functions of that commission and certain monies for staff and related expenses to the State Racing and Wagering Board. The purpose of the recommendation was to consolidate in the State Racing and Wagering Board functions regulating games of chance. In addition, a specific budget bill was introduced in the Legislature, which, among other things, was designed to abolish the Bingo Control Commission. In the 1975 Budget there was no appropriation for the State Bingo Control Commission and there was an additional appropriation to the State Racing and Wagering Board. The specific bill abolishing the State Bingo Control Commission, however, passed the Assembly but did not pass the Senate.

The issue presented is whether the



Legislature in adopting the 1975 Budget evidenced an intent to abolish the New York State Bingo Control Commission. In my opinion, the specific language contained in the Program Budget Presentation recommending the abolition of the State Bingo Control Commission and the subsequent passage of the Budget by the Legislature evidences a sufficient direct action on the part of the Legislature to abolish the State Bingo Control Commission. The failure of the Legislature to pass the bill directly affecting the State Bingo Control Commission does not, in my view, negate the direct action by the Legislature. Church of the Ascension v. New York State Racing and Wagering Board, New York Law Journal, January 22, 1976, P. 8 Col. 2-3; c.f., Lorraine v. Carey, unpublished

opinion of Hon. James Gibson dated April 22, 1975; contra, Ball v. State of New York, 83 Misc.2d 903.

Motion for temporary injunction is denied. Submit order.

Dated: Troy, New York
March 23, 1976.



At a Special Term of the Supreme Court of the State of New York, held at the Albany County Court House, Albany, New York on the 11th day of December, 1975.

PRESENT:
HONORABLE JOHN T. CASEY
Justice of the Supreme Court

Same Title

ORDER
Index No.: 15351-75

Plaintiffs having moved for a preliminary injunction to enjoin the New York State Racing and Wagering Board from: (1) approving fair and reasonable maximum rent schedules to commercial lessors for bingo occasions to be held in 1976; (2) issuing bingo suppliers licenses for the year 1976; (3) from hearing any appeal from municipal determinations concerning bingo hearings and other matters; (4) exercising any other powers granted to the State Bingo Control Commission under Section 435(1) of the Executive Law; (5)

compelling certain civil service employees who were transferred from the State Bingo Control Commission to the State Racing and Wagering Board from working out of title; (6) disbursing any funds appropriated to the State Racing and Wagering Board for bingo enforcement purposes, now

UPON the Order to Show Cause signed by the Honorable Howard A. Zeller, Justice of the Supreme Court, on November 21, 1975, the Affidavit of Ira M. Ball, Esq., sworn to November 20, 1975, the Summons, dated November 21, 1975, the Complaint, verified by Ira M. Ball, Esq., on November 20, 1975, the Amended Order, signed by Honorable Howard A. Zeller, Justice of the Supreme Court, on December 2, 1975, the Affidavit of Ira M. Ball, Esq., sworn to December 1, 1975, the Affidavit of



Kenneth J. Connolly, Esq., sworn to December 8, 1975, the Reply Affidavit of Ira M. Ball, Esq., sworn to December 10, 1975, the Supplemental Affidavit of Ira M. Ball, Esq., sworn to December 15, 1975, the Affidavit of Ira M. Ball, Esq., sworn to November 28, 1975, and upon all the papers and proceedings heretofore had herein, and after hearing Ira M. Ball, Esq., attorney for plaintiffs, in support of the motion, and Louis J. Lefkowitz, Attorney General of the State of New York, Kenneth J. Connolly, Esq., of Counsel, in opposition thereto, and the Court having rendered a decision dated March 23, 1976, denying the motion, it is

ORDERED, that plaintiffs' motion for a preliminary injunction is hereby denied.

DATED: April 13, 1976
Troy, New York

/s/ John T. Casey
John T. Casey
Justice of the Supreme Court

ENTER:



At a Special Term of the Supreme Court of the State of New York, Part I, held in and for the County of Albany, at the County Court House at Albany, on the 11th day of December, 1975.

Present: Hon. John T. Casey, Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Same Title

Index No. 15351-75

Order amending Order denying Preliminary Injunction

The plaintiffs having duly moved this Court for an Order granting a preliminary injunction pursuant to an Order to Show Cause dated November 21, 1975 and this Court having written a Memorandum dated March 23, 1976 denying the temporary injunction and the defendants having entered an Order denying the plaintiffs' motion for a preliminary injunction on April 13, 1976 which was entered in the Albany

County Clerk's Office on the 19th day of April, 1976;

AND plaintiffs having submitted an Order to Show Cause to this Court for leave to re-argue and/or renew their motion for a preliminary injunction together with a supporting affidavit of Ira M. Ball, sworn to on the 26th day of March, 1976;

AND this Court having notified said Ira M. Ball by letter dated March 29, 1976 that the "papers in support of the motion for re-argument do not convince me otherwise." and declined to sign said Order to Show Cause;

AND it appearing that the defendants' Order dated April 13, 1976 and entered in the Albany County Clerk's Office on the 19th day of April, 1976 should be and



hereby is amended to add the following paragraph:

"And it is further
ORDERED, that the Order herein signed April 13, 1976 and entered in the Albany County Clerk's Office on April 19, 1976 should be and hereby is amended by adding the following paragraph:

ORDERED, that the plaintiffs' motion for leave to re-argue and/or renew their motion for a preliminary injunction is denied."

/s/ John T. Casey
Justice of the Supreme Court

ENTER:

Signed at Troy, New York on
the 14 day of May, 1976

STATE OF NEW YORK
SUPREME COURT CHAMBERS
TROY, N.Y. 12180

March 29, 1976

Ira M. Ball, Esq.
Attorney at Law
298 Genesee Street
Utica, New York 13502

RE: Ball, et al v. Carey, et al

Dear Mr. Ball:

This court refuses to grant reargument in the above entitled matter.

All the points advanced by the petitioners have been considered by this court in its original decision. The papers in support of the motion for reargument do not convince me otherwise. The matter should be appealed.

The order to show cause is returned unsigned.

Very truly yours,

/s/ John T. Casey

John T. Casey
Supreme Court Justice

JTC:ewo
encs.



STATE OF NEW YORK
COURT OF APPEALS

Ira M. Ball, Respondent,

vs.

The State of New York, Appellant.

OPINION

GABRIELLI, J.:

In this case we must decide whether claimant, Chairman of the State Bingo Control Commission, is entitled to his salary for that office from April 1, 1975 to September 2, 1975. More precisely, the determinative issue is whether the Legislature in enacting the 1975-1976 budget (L 1975, c 50) abolished both the State Bingo Control Commission and claimant's office either by direct action or by implication in failing to expressly

appropriate funds for the commission or for claimant's salary. Both the Court of Claims and the Appellate Division have held that the Legislature had not taken the necessary action to abolish claimant's statutorily created position. We agree with the determination of the courts below.

Bingo had been legalized in New York State by a 1957 amendment to the New York State Constitution (see NY Const, art 1, §9(2)). The State Bingo Control Commission was created in 1962 to rigidly regulate the game of bingo in the State and prevent the infiltration of criminal and other undesirable elements into the game (see Executive Law, Article 19-B, §§430-439-b; General Municipal Law, Article 14-H, §§475-499; Report to Gov Rockefeller of Moreland Act Commission (March 1, 1962)).



Claimant has been the Chairman of the Commission since its creation. In June, 1974, he was reappointed to this position for a third five year term to expire in 1979, and his appointment was confirmed by the Senate. In his 1975-1976 Executive Budget, the Governor recommended the abolition of the Bingo Control Commission, and Budget Bill S3492/A4509 was introduced to effect that recommendation and transfer the functions of the commission to the State Wagering and Racing Board. The bill was passed by the Assembly but failed to win approval in the Senate and, thus, never became law. The 1975-1976 budget formally known as "State Purposes Appropriation Bill" (L 1975, c 50) was passed by the Legislature on March 26, 1975 and signed by the Governor on April 7, 1975. The

budget contained no provision relating to the abolition of the Bingo Control Commission or the transfer of its functions to the Racing and Wagering Board. Although no funds were specifically appropriated for the commission or for claimant's salary, the budget contained a lump sum appropriation for $399,200 under the title "Regulation of Wagering" earmarked for "Personal service - regular" (L 1975, c 50, p 240). A portion of these funds was presumably intended for the regula-



tion of bingo activities in the State.[1] Following the enactment of the budget bill, representatives of the Racing and Wagering Board proceeded to dismantle the

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[1] There is, of course, no claim that there has been any alteration of the comprehensive statutory scheme for the regulation, licensing and supervision of bingo contained in Articles 19-B of the Executive Law and 14-H of the General Municipal Law. Thus it remains the legislative policy in this State that "all phases of the supervision, licensing and regulation of bingo and the conduct of bingo games, should be closely controlled and that the laws and regulations pertaining thereto should be strictly construed and rigidly enforced" (Executive Law, §431; General Municipal Law, §475).

Albany and New York City offices of the Bingo Control Commission and purported to terminate its staff and transfer some of the positions to the Racing and Wagering Board. Former employees of the commission who had been transferred to the Board were instructed not to provide any information to claimant or perform any work for him. Nonetheless claimant continued to perform and execute his responsibilities as best he could. Claimant received no salary after April 1, 1975 and on April 9, 1975 claimant received a letter from the secretary to the Governor stating that his office was terminated. Claimant, filling a statutorily created office, replied that no action had been taken by the Legislature to abolish the commission and was informed in reply that



> "(w)hile you are correct in stating that final approval has not been given to the Budget Bill abolishing your agency * * * assurances have been given * * * that it will be passed by the Senate."

As previously noted, the bill was never enacted into law. On July 29, 1975 claimant filed his claim for salary due. His motion for summary judgment was granted in the amount of $14,966.57, representing his salary from April 1, 1975 to September 2, 1975, the date of the motion.

Events subsequent to the enactment of the 1975-1976 budget are of particular interest in this case. On August 6, 1975, the Governor approved a bill (L 1975, c 667, §16) which amended section 169 of the Executive Law by repealing a subdivision thereof and relettering

certain other subdivisions, without deleting a subdivision expressly setting forth the salary of the "chairman of the state bingo control commission" (see Executive Law, §169(j) as amended). The amendment became effective on August 6, 1975 but was made retroactive to April 1, 1975. It is also noteworthy that on January 20, 1976, the Governor submitted, in connection with the 1976-1977 budget, a new budget bill to abolish the Bingo Control Commission (S 7298/A 9268). The bill was identical to that which failed to win legislative approval in 1975 except that it contained the following provision:

> "All appropriations made to the State Bingo Control Commission pursuant to Section 1 of Chapter 50 of the Laws of 1975, to the extent of remaining unexpended balances, are hereby transferred and made available for use by the State Racing and Wagering Board."



This bill died in committee and thus met the same fate as the 1975 bill seeking to abolish the Bingo Control Commission.

It is axiomatic that the Legislature may abolish or shorten the term of positions which it has created (see eg, Lanza v. Wagner, 11 NY 2d 317, 324; Nichols v. MacLean, 101 NY 526, 533; Matter of Friedman v. D'Antoni, 50 AD 2d 9, 10-11). Thus, in the early case of Nichols v. MacLean (supra, p 533), it was held that "(t)he Legislature may abolish an office during the term of an incumbent or diminish the salary or change the mode of compensation, subject only to Constitutional restrictions." It is clear in this case that the Legislature took no express action to abolish the Bingo Control Commission or the office of chairman of that

agency. Thus, the issue presented is essentially one of legislative action and intent; may it be inferred from the enactment of the 1975-1976 budget without explicit appropriation of funds for claimant's salary that the Legislature expressly or impliedly repealed the office of chairman of the Bingo Control Commission?

Article 19-B of the Executive Law creates the Bingo Control Commission and specifies its purpose and function. Section 433 (subd (1)) of the Executive Law establishes the position of chairman of the commission, and subdivision (5) thereof provides that "(t)he chairman shall receive compensation fixed by the governor within the amount made available by appropriation therefor."



Subsequent to the adoption of the latter statute, section 169 of the Executive Law (as amended) was approved by the Governor and became effective on August 6, 1975, but, by its terms, was made retroactive to April 1, 1975. That section fixes the chairman's salary, providing that:

> "The annual salaries of the officers holding the positions indicated hereinbelow shall be as follows:
>
> * * *
>
> (j) * * * chairman of the state bingo control commission * * *, $35,350."

As we have already point out, the initial Executive Budget included a bill which would "transfer responsibility for the regulation and control of bingo from the Department of State" to the Racing and Wagering Board by abolishing

the Bingo Commission but this bill failed to win legislative approval. Nowhere in the 1975-1976 budget as enacted by the Legislature is there any provision for the elimination of the Bingo Control Commission or the transfer of its activities. While there is no specific appropriation of funds for the Commission or claimant's salary, there is a lump sum appropriation for the regulation of wagering. This Court has held that in some instances the failure to make appropriation for the salary of one appointed to a statutorily created office may not operate to deprive the office holder of his salary (O'Neil v State of New York, 223 NY 40, 44; see also, Matter of Collins v City of Schenectady, 256 App Div 389, 391). By its failure to pass the



legislation explicitly accomplishing the result sought by the Governor, or to specifically provide in the budget as finally enacted for the abolition of the bingo commission, the Legislature may be deemed to have expressed an intent not to eliminate the commission or the office of chairman. The Governor's reintroduction of the bill eliminating the Bingo Control Commission in 1976 quite obviously seems to indicate his own understanding that the Legislature had not, by the mere enactment of the 1975-1976 budget, repealed the applicable sections of the Executive Law.

The doctrine of repeal by implication is heavily disfavored in the law and may be resorted to only in the clearest of cases (Cimo v State of New York, 306 NY

143, 148; City of New York v Matbie, 274 NY 90, 97; see also, Matter of Corning v Donohue, 29 NY 2d 209, 215; McKinney's Statutes, §391; cf Brooklyn Union Gas Co v New York State Human Rights Appeal Board, ___ NY2d ___, decd Dec. 20, 1976). The rule has been neatly stated that "such repeals (by implication) will not be discovered unless the conclusion is unavoidable, as when repugnancy between the two statutes is plain" (Cimo v State of New York, supra, p 148). Moreover, the general rule "'applies with peculiar force to statutes enacted at the same session of the Legislature'" (County of Saratoga v Saratoga Harness Racing Assn, 4 NY 2d 622, 627, quoting from Board of Education v Roger, 278 NY 66, 71). The Legislature which



enacted the 1975-1976 budget also amended section 169 of the Executive Law without deleting from that statute the express provision for claimant's salary. We may not conclude, therefore, that the budget operates as a repeal by implication of sections 433 and 169(j) of the Executive Law since the Legislature itself appears to have recognized that the provision for claimant's salary in section 169(j) remains an enactment of continuing legal validity in the state (see McKinney's Statutes, §376). In sum, the budget bill is a general statute which establishes a lump sum appropriation for the regulation of wagering; it does not supersede the specific, detailed statutory provisions creating the bingo control commission and its operations.

We turn now to appellant's contentions that the enactment of the budget was sufficient to repeal the applicable sections of the Executive Law upon which claimant bases his claim for salary. On this appeal, the State advances the argument that section 44(2) of the State Finance Law should be construed to require that the budget must provide a specific appropriation for a public officer's salary. That statute provides:

> "Any appropriations for salary, compensation or expenses shall be the salary, compensation or expenses for one year of the officer, employee, office, board, department, commission or bureaus for whom or which the same is appropriated, notwithstanding existing provisions of any other statute fixing the annual salary, compensation or expenses of such officer or employee * * * at a different amount."

This section is operative only in the situation in which an actual budgetary



appropriation for salary differs from the salary specificed in a statute. In such a case section 44(2) provides that the amount of the appropriation is the controlling amount of salary. It does not operate to deprive a public officer of his salary where the budget makes no specific appropriation for salary but only contains a general lump sum provision for "Personal service". In fact, it appears that not only did the 1975-1976 budget make no specific appropriation for the salary of the chairman of the Bingo Control Commission but there are also no specific salary appropriations for any other public officials (except for certain members of the Alcoholic Beverage Control Board in New York City, see L 1975, c 50, p 20). Indeed, the budget merely contains lump sum

provisions for "Personal service" under the various departmental headings; it cannot be seriously maintained that by virtue of section 44(2) of the State Finance Law, the vast majority of public officials of the State are not entitled to any salaries.

Appellant also relies on the "Joint Legislative Report of the Senate Finance and Assembly Ways and Means Committee on Actions Taken on the 1975-1976 Executive Budget" as a "precise declaration of Legislative intent" to abolish the Bingo Control Commission and claimant's position. The report merely indicates the recommendation of the joint committee and obviously is not itself an expression of legislative intent especially in light of the failure of the bill specifically abolishing the commission to win approval. However, an examination



of the portion of the report dealing with regulation of wagering contains no discussion relating to the elimination of the commission. The report (p 85) recites that four non-statutory positions in the Racing and Wagering Board are abolished, that fourteen Bingo Investigator positions transferred from the Department of State are abolished, and that a position, Director of Division of Bingo, in the Racing and Wagering Board is approved "to design and clarify" the state's regulatory activities with respect to bingo. There is a conspicuous absence of any language relating to the elimination of claimant's position or the Bingo Commission itself. The same reasoning applies with regard to a memorandum from the Deputy Comptroller. The memorandum is dated March 31, 1975 and

prior, of course, to the adjournment of the Legislature on July 12, 1975 without having passed any legislation designed to abolish the Bingo Commission. The memorandum itself noted that substantive legislation abolishing some agencies had not yet been enacted. Obviously, in the face of the failure of such legislation to win final approval, the initialling of the memorandum by the committee chairman may not serve as evidence of legislative intent.

Finally, appellant places considerable reliance on our recent decision in Matter of Blyn v. Bartlett (39 NY 2d 349), which involved the question whether the Administrative Board of the Judicial Conference could validly abolish the positions of confidential attendant in the Supreme Court and law secretary in the Civil Court of



the City of New York. Our decision in the case was predicated upon the conclusion that section 222 of the Judiciary Law vested the Administrative Board with the power to abolish such positions despite the provision in section 166 of the Judiciary Law that Supreme Court Justices shall appoint law assistants. We held that "Article 7-A of the Judiciary Law is infused with the idea of centralized control and authority and in section 222 the power to appoint personal assistants is made expressly subject to such control" (supra, pp 360-361). In the instant case, respondent's position is not statutorily conditioned upon the review or approval of any administrative body.

We conclude by emphasizing that this case in not resolved by recourse to the truisms

that "(t)he courts do not sit in judgment of legislative policy * * * " (Gaynor v. Rockefeller, 15 NY 2d 120, 134) and that the province of the Courts does not extend to the wisdom, necessity or motivation of legislation (see Kittinger v. Buffalo Traction Co, 160 NY 377, 388, 389). Reliance on these basic jurisprudential principles may not compensate for the absence of required legislative action. The policies of the Executive Branch in budgetary matters are subject to the approval of the Legislature (NY Const, Art 7, §§2, 3, 4) and only the Legislature may repeal a validly enacted statute. Under the circumstances presented here we cannot conclude that the Legislature has manifested a clear intent to repeal the existing statutory authority establishing the Bingo Con-



trol Commission. In making this determination we do not abdicate our judicial role in derogation of legislative authority. Rather, we only apply the constitutional dictate that the legislative power of the state is vested in the Senate and Assembly (NY Const, Art 3, §1). "Thus reads the fundamental law binding on us all, Judiciary, Governor and Legislature" (People v. Tremaine, 281 NY 1, 11).

Accordingly, the order of the Appellate Division should be affirmed without costs. The Court has denied costs because of the excessive length of respondent's brief (see, e.g., Slater v. Gallman, 38 NY 2d 1; see also Rochester City School District v. Rochester Teachers' Association, ___NY 2d___, decided herewith).

* * * * * * * * *

Order affirmed, without costs. Opinion by Gabrielli, J. All concur

Decided April 7, 1977



STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

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IRA M. BALL,

Respondent-Appellant.

-against-

STATE OF NEW YORK,

Appellant-Respondents.

(Claim No. 59498.)

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Argued, February 2, 1976.

SWEENEY, J.

Claimant was appointed Chairman of the New York State Bingo Control Commission in June of 1962 when the Commission was established and has continued to serve in that position ever since via subsequent 5-year appointment. His present term expires June 1, 1979.

In the 1975 Executive Budget the Governor recommended abolition of the Bingo Commission and transfer of the regulation and control of bingo to the State Racing and Wagering Board. A bill implementing this recommendation passed only one house of the Legislature. The 1975-76 State budget provided no funds for the Bingo Commission (L. 1975, ch. 50). There was, on the other hand, an appropriation to the State Racing and Wagering Board for "Regulation of Wagering"

for "Personal service -- regular", an amount which represented an increase of some $236,000 over such appropriation in the 1974-75 State budget.

Since April 1, 1975, claimant has received no salary or expense payments. The offices of the Bingo Commission have been dismantled and, although claimant performed services for the Commission as best he could from April 1, 1975 to July 16, 1975, he ceased performing such services when Bingo personnel were ordered by the Racing and Wagering Board personnel not to perform services for claimant, nor to give him any information. Claimant filed a claim in the Court of Claims on July 29, 1975, seeking salary and expenses from April 1, 1975 to the date of filing of said claim. Claimant's motion for summary judgment to the extent that he is entitled to the appropriate amount of his unpaid salary, plus interest, was thereafter granted.

On this appeal claimant has withdrawn his cross-appeal. The State first contends that the Court of Claims lacked jurisdiction to determine the claim in the absence of a judgment of the Supreme Court reinstating claimant to his position as Chairman of the State Bingo Commission. We disagree. Claimant's removal was not accomplished by a body or officer against whom an article 78 proceeding would lie. Nor would an article 78 proceeding in the nature of mandamus



to compel the comptroller to pay claimant's salary be effective. The comptroller cannot audit a claim for salary unless an appropriation applicable thereto has been made. (State Finance Law, § 43.) Where the comptroller has refused to audit a claim for salary because no money has been appropriated, the Court of Claims should determine such claim. (O'Neil v. State of New York, 223 N.Y. 40.) Since it is alleged that the State owes claimant money, the Court of Claims has jurisdiction of the subject matter and it is the only forum in which the State has consented to be sued. (Friedman v. State of New York, 24 N.Y.2d 528, 536.)

The central issue on this appeal is whether claimant's position was abolished by the Legislature upon the enactment of the 1975-76 State budget bill (L. 1975, ch. 50). Claimant's position was statutorily created and his term of office, salary and duties statutorily prescribed. (Executive Law, art. 19-B; §169 subd. j.) The abolishment of such a position may be accomplished only by direct action of the Legislature. (Matter of Friedman v. D'Antoni, 50 A.D. 2d 9, app. dsmd. ___ N.Y.2d ___ (Mar. 30, 1976).) The State urges that the passage of Chapter 50 of the Laws of 1975 constituted such direct action by the Legislature and claimant's position was thereby effectively abolished. It points to the Executive Budget, a joint report by the Senate Finance Committee and the Assembly Ways & Means Committee and to

circumstances surrounding the enactment of such budget bill to demonstrate the required legislative intent to abolish claimant's position. Claimant, on the other hand, asserts that since there was a failure to pass legislation specifically designed to abolish his position, it was not abolished. We agree. We do not find the direct legislative action necessary to abolish claimant's position in the enactment of the 1975-76 State budget, nor would a repeal by implication of article 19-B of the Executive Law by such statute because of failure to appropriate funds for claimant's salary, constitute such direct action.

While the appropriations set forth in the 1975-76 budget were determined on the basis of the Governor's recommendations in his Executive Budget and no appropriation was included therein for the Bingo Commission, the State cannot deprive claimant of the salary for his fixed-term position as prescribed by the Executive Law by refusing to appropriate funds therefor. The Legislature must abolish such a statutorily fixed-term position by a legislative act which specifically provides therefor and states in explicit language that such is the intent. In the case before us we are not dealing with the abolition of positions in the civil service and the transfer of functions of agencies where no funds had been appropriated by the Legislature, as was the case in Matter of



Lorraine v. Carey ( Misc 2d ), relied on by the State. (Cf. People ex rel. Davison v. Williams, 213 N.Y. 130.) The case of Church of the Ascension and Church of the Holy Name of Jesus, v. New York State Racing and Wagering Board (N.Y.L.J. January 22, 1976, p. 8, col. 2) is not inconsistent. There the court held that Chapter 50 of the Laws of 1975 effectively implemented the Governor's recommendation to abolish the Bingo Commission and transfer its functions to the Racing Board. There was no issue in that case concerning the abolition of the position of the Chairman of the Bingo Commission which was statutorily created for a definite term of years.

The judgment should be affirmed, with costs.

HERLIHY, J. (concurring).

I agree with the conclusion of the majority that the direct legislative action necessary to abolish the claimant's position is not established by the facts and circumstances of this case. I do not agree, however, with the assertion that a repeal by implication of article 19-B of the Executive Law would not also abolish the claimant's position and preclude his right to recover unpaid salary. The sole right of claimant to his salary would be his appointment for a five-year term and the repeal of

article 19-B would necessarily shorten his term to the time already served by direct action of the Legislature. For the following reasons, I have concluded that the legislative action involved in this case did not repeal section 433 of the Executive Law.

The general rule as to repeal by implication is that "Repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect." (McKinney's Cons. Law. of N.Y., Book 1, Statutes, § 391; Matter of Corning v. Donohue, 29 N.Y. 2d 209. 215.) "The absence of an express provision in a later statute, for repeal of an earlier one, gives rise to a presumption that repeal was not intended (citation omitted). If by any fair construction, both statutes can be given operation, implied repeal will not be declared * * * a more general statute * * * will not repeal a more specific one * * * unless there be patent inconsistency and the two cannot stand together, so that the Legislature is clearly shown to have intended such a result (citations omitted)". (Cimo v. State of New York, 306 N.Y. 143, 148, 149; see, also, People v. Mann, 31 N.Y. 2d 253, 258.)

"(T)he primary and fundamental question to be resolved is what did the Legislature intend." (People v. Mann, supra, p. 257.)

Upon its face the budget bill does not purport to repeal any of the provisions



of article 19-B. The appropriation for "personal service - regular" for the State Racing and Wagering Board was a lump sum in 1975 and the appropriation for the Department of State was in the same form. Pursuant to the provisions of article 7 of the Constitution it appears that in connection with the budget bill, the Legislature could have repealed article 19-B or specifically abolished any personnel provisions therein as being related to the appropriation requested and granted. Unlike other legislation, the budget bill for the Executive Department becomes law immediately upon its passage by the Legislature and without approval by the Governor. In connection with the budget, the Governor did submit specific legislation abolishing the Bingo Commission and transferring its powers to the Racing and Wagering Board as well as repealing sections 433 and 439-b of the Executive Law. The Legislature did not pass that legislation.

The joint report of the finance committees recites that the proposed transfer of 14 Bingo Investigator positions is denied and/or abolished and a new position "Director of Division of Bingo" was approved. The report said his duties were to "design and clarify the State's regulatory activities related to Bingo Control and Local Enforcement responsibilities". The report, however, does not recite that the Bingo Commission was to be abolished or that

any particular Bingo Commission powers were to be transferred to the Racing and Wagering Board. The report states "In reading the narrative it should be noted that all agency programs may not be listed."

The legislative action in the present case does not establish any clear intent on its part to abolish the Bingo Commission. Section 433 is a special or specific statute and the budget bill is a general statute. It is entirely possible to transfer certain functions to the Racing and Wagering Board without abolishing the commission. Indeed, the new Director of Division of Bingo in the Racing and Wagering Board was merely directed to design and clarify regulatory activities by the Joint Report. This could be a service to the Bingo Commission even though he is placed in the Racing and Wagering Board. Section 434 of the Executive Law provides for assistance to the Bingo Commission from other agencies or departments.

The conclusion that the Legislature had no specific intent to abolish the Bingo Commission and in particular the claimant's position as fixed in section 433 of the Executive Law has further support by later action of the same Legislature. In August of 1975 Chapter 667 of the Laws of 1975 was approved and became law, retroactive to April 1, 1975, and section 16 thereof repealed subdivision (e) of section 169 of the Executive Law and relettered the subdivision which recites



the title of "chairman of state bingo control commission" without striking that title from the statute. By implication, the legislative intent as expressed in August of 1975 and retroactive to April 1, 1975 was that the claimant's position was not abolished.

The specific legislation introduced in the Legislature did not pass in the Senate and, therefore, did not become law. On the record it is impossible to conclude that the passage of the Budget Bill, by implication, abolished the claimant's position.

The judgment appealed from should be affirmed.

MAHONEY, J. (concurring in part and dissenting in part).

We concur with that portion of the majority's decision that holds that the Court of Claims had jurisdiction of the subject matter and was the proper forum for litigation of the issue before us.

We dissent from the substantive holding by the majority that enactment of the 1975-76 State Budget Bill did not abolish claimant's position as Chairman of the New York State Bingo Control Commission.

The specificity required by the majority, i.e., the passage of the budget bill

implementing the Governor's intention, evidenced by the 1975 Executive Budget, of abolishing the position of Chairman of the New York State Bingo Control Commission, in our view, places the emphasis on form rather than substance. The 1975-76 Budget Bill (L. 1975, ch. 50) is no less a statute than the bill specifically mentioning the subject position by title would have been had it been enacted.

Although a position legislatively created may be abolished only by statute (Matter of Sullivan v. Taylor, 279 N.Y. 364) and a failure to appropriate a salary for such a position is insufficient action to accomplish that end (Matter of Collins v. City of Schenectady, 256 App. Div. 389; Timpano v. Hanna, 77 Misc 2d 874, affd. 44 A D 2d 912), a statute, such as the 1975-76 budget, which in addition to eliminating the salary for the subject position also evidences an intent to abolish the position itself by transferring all of the duties heretofore discharged by the Bingo Control Commission Chairman to the State Racing and Wagering Board, qualifies as the "direct action" by the Legislature requisite to the abolishment of the postiion statutorily created (Friedman v. D'Antoni, 50 A D 2d 9, app. dsmd. ___ N Y 2d ___). Further evidence that such was the legislative intent can be gleaned from Exhibit F attached to the answering affidavit of claimant wherein both the Senate Finance Committee and the



Assembly Ways and Means Committee, by initialling a memorandum from the Deputy Comptroller, affirmatively stated that it was legislatively intended "that the functions, powers and duties of the public officials * * * were * * * transferred to the departments and agencies receiving the appropriation." Clearly, it appears that the Governor intended and requested that the subject position be abolished and that the appropriate committees of the Legislature acquiesced in the Governor's recommendation by recommending for passage the 1975-76 budget which, in fact, transferred all the functions, powers and duties of the Bingo Chairman to the State Racing and Wagering Board.

Since, in our view, the intention of the Legislature to abolish the subject position is clear, it is unnecessary to withhold approval of the legislative design merely because the statute could have been expressed more clearly. It is well-settled that "(I)t is the duty of courts to adopt a construction of a statute that will bring it into harmony with legislative intent, and no narrow construction of a statute may thwart the legislative design." (McKinney's Cons. Law of N.Y., Book 1, Statutes, § 92). In Matter of River Brand Rice Mills, Inc. v. Latrobe Brewing Co. (305 N.Y. 36), the court stated:

> The intent of the Legislature in enacting legislation is the primary ojbect to be found. Whenever such

intention is apparent it must be followed in construing the statute * * * " case within the intention of a statute is within the statute, though an exact literal construction would exclude it." (305 N.Y. 36, 43; see, also, Matter of Wilson v. Board of Educ., Union Free School Dist. No. 23, Town of Oyster Bay, 39 A D 2d 965, mod. 32 N Y 2d 636; Community School Bd. Dist. 3 of School Dist. of City of N.Y. v. Board of Educ. of School Dist. of City of N.Y., 66 Misc 2d 739, affd. 38 A D 2d 932.)

In People ex rel. Wood v. Lacombe (99 N.Y. 43), the Court of Appeals stated:

> In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a techincal interpretation it is not within its letter. (99 N.Y. 43, 49.)

Therefore, since the 1975-76 budget (L. 1975, ch. 50) not only eliminates any appropriation for the subject position,



but also eliminates any appropriation for the Commission over which claimant had heretofore presided and, further, transfers all retained employees and the monies for their salaries to another department and directs that department discharge all the functions and duties heretofore delegated to the Bingo Commission, the legislative intent is abundantly clear. That legislative intent must be recognized by this court for any judicial construction to the contrary would be an iimpermissible interference with the functions of one branch of government by another.

The judgment should be reversed.

STATE OF NEW YORK
COURT OF APPEALS

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Church of the Ascension & ano.,
Respondents,
vs.
New York State Racing and Wagering Board, et al.,
Appellants,
Elinor Guggenheimer, Commission of New York City Department of Consumer Affairs,
Respondent,
and Belfran Industries,
Appellant.

MEMORANDUM

MEMORANDUM:

The order of the Appellate Division should be affirmed, without costs.

Both the determination of the Bingo Control Commission granting respondents leave to file notices of appeal nunc pro tunc and the determination of the Racing and Wagering Board vacating that order were made while the Bingo Control Commission



was vested with the authority to regulate the game of Bingo. The State Purposes Appropriation Bill (L 1975, ch 50) neither abolished the Bingo Control Commission, nor transferred its authority to the Racing and Wagering Board. (Cf., Ball v. State of New York, 41 NY2d 617, 625.) Accordingly, the Racing and Wagering Board had no authority to vacate the order of the Bingo Control Commission granting respondents leave to file notices of appeal nunc pro tunc. We note, however, as did the Appellate Division, that inasmuch as the propriety of the order of the Bingo Control Commission is not before us on this appeal, we express no opinion on this issue.

* * * * * * *

Order affirmed, without costs, in a memorandum. All concur.

Decided December 20, 1978

BALL et al . v. CAREY, et al.
BALL AFFIRMATION, ¶"First", pgs. 3-5, 9

First: Said Plaintiffs were wrongfully dismissed from their positions as investigators (mainly) for the State Bingo Control Commission by the Respondents without any statutory or other legal authority and in violation of Article 5, §6 of the New York State Constitution and its implementing statute, the Civil Service Law. All of the Defendants-Respondents are sued as individuals insofar as the allegations of wrongful discharge and malicious interference with Plaintiffs' employment are concerned.

A. Said Article 5, §6 of the Constitution has been interpreted by the Court of Appeals as giving "at least something like permanency of tenure to appointees in



the civil service, and above all to put an end to the vicious practice which had grown up out of changing employees whenever the appointing power was changed without any cause except the unrestrained will of the person who happened for the time being to be at the head of the department." Matter of Seeley v. Stevens, 190 N.Y. 158, 163.

> "If the legislature should repeal all the (Civil Service) statutes and regulations on the subject of appointments in the civil service, the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal. (People ex rel. McClelland v. Roberts, 148 N.Y. 360, 366.)"
>
> Wipfler v. Klebes
> 284 N.Y. 248 at 254.

B. The constitutional question now presented to this Court is:

Can a judicially declared rule of law

("absolute immunity" established by case law) overcome the constitutional property right that the Plaintiff civil service personnel have to their permanent positions? Where a statute conflicts with constitutional provisions, the statute must fall. See McKinney's Statutes, §150. Certainly a statute is of higher quality than case law* such as "absolutely immunity" of public officers and employees established by the Appellate Division for the first time on the appeal to that Court. Therefore, the case law rule of "absolute immunity" must bow before the ever

* See: In re Brown's Ex'n, 130 Misc. 865, 226 NYS 1 at 22, mod. other grounds, 225 A.D. 759, 232 NYS 371 cited in 86 C.J.S., Statutes §2, Nature of Statutes, no. 70.



present provisions of Article 5, §6 of the State Constitution. See quote Valz v. Sheepshead etc. at p. 21, infra.

In discussing a similar problem which involved a statute enacted by the Legislature, the Court of Appeals wrote in People v. Hawkins, 157 N.Y. 1 at 7-8:

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purpose of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection.

* * *

"The guaranty against depriving the citizen of his liberty comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business are infringements upon his fundamental rights of liberty, which are under constitutional protection." (Emphasis supplied.)

If the foregoing applies to statutory law, a fortiori it must apply to judicially established case law.

* * *."